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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re

Request of Cellular Communications of
Puerto Rico, Inc. to Hold Auctions to
License Certain Cellular RSAs

RM-8897

To: Chief, Commercial Wireless Division
Wireless Telecommunications Bureau

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

**MOTION TO STRIKE REPLY COMMENTS OF
CELLULAR COMMUNICATIONS OF PUERTO RICO, INC.**

The RSA Operators Group ("RSAOG"), by their counsel, move to strike the Reply Comments of Cellular Communications of Puerto Rico, Inc. ("CCPR"), which were filed with the Commission on December 10, 1996. These Reply Comments were filed in support of CCPR's Petition for Declaratory Ruling Or, In the Alternative, For Rulemaking ("Petition") and should be stricken for the same reasons that CCPR's Petition should be stricken. ¹

¹ See Motion to Strike and Request for Sanctions Against CCPR ("Motion") filed by RSAOG on December 10, 1996. In addition to the Motion, RSAOG filed Comments and Reply Comments in this rulemaking proceeding in response to a Commission request for comment. In doing so, RSAOG did not seek to adversely affect any of the pending RSA applications which have been accepted for filing. Accordingly, RSAOG requested waiver of its service obligations respecting the pending RSA applicants. RSAOG requests the same waiver respecting this pleading.

CCPR's Petition and Reply Comments all advocate dismissal of pending RSA applicants in the Ceiba RSA market and the other markets that are the subject of this proceeding. Therefore, CCPR was required to serve both filings on all pending RSA applicants for which they sought dismissal. CCPR's claims of inconvenience notwithstanding, waiver of the ex parte rules is not appropriate for them.

CCPR's Reply Comments supporting its initial Petition should be stricken because they were filed in violation of the Commission's *ex parte* rules. CCPR's Reply Comments advocate dismissal of the pending applications in the six RSA markets that are the subject of this rulemaking proceeding, and the opening of a new filing window to allow all interested parties, including CCPR, to file new applications for permanent authorization in these markets. CCPR Reply Comments at pp.15-16. The Commission's *ex parte* rules required CCPR to serve copies of its Reply Comments on each of the pending applicants it asks the Commission to dismiss, most especially those applicants pending in the Ceiba RSA proceeding, where CCPR currently has Interim Operating Authority ("IOA") and has shown the greatest interest in acquiring.

CCPR argues that it has not, in either its Petition or Reply Comments, violated the Commission's *ex parte* rules, because none of its presentations have been directed to the merits or outcome of a restricted proceeding. CCPR Reply Comments at pp.17-18. CCPR states that is "did not opine on the relative merits of the applicants or on which party should or should not be granted an license." CCPR Reply Comments at p.18. That characterization is inconsistent with the Commission's determination that CCPR's contacts with the Chairman's and the Commissioners' staffs were impermissible *ex parte* contacts.² Further, Commission precedent

² See Public Notice Concerning CCPR's Petition for Declaratory Ruling or Rulemaking, DA 96-1685, released October 24, 1996, p.2.

compels a finding that CCPR's communications with the Commission did go directly to the merits of the Ceiba RSA proceeding.

CCPR has not distinguished its actions from the actions that violated the Commission's *ex parte* rules in Russell H. Carpenter, Jr., Esq., 3 FCC Rcd 6141 (OMD 1988). In that case, the attorney for Schelle, Warner Murray & Thomas, Inc., and its affiliated companies (collectively "Schelle") met with the FCC Chairman's Chief of Staff to discuss the possibility of Schelle settling various MSA cellular markets as a so-called "white knight." Schelle then, at the request of the Chief of Staff, prepared and submitted a memorandum describing those settlement efforts.

Schelle argued that its presentations concerned proposed settlement processing procedures of general applicability, and therefore could not be found to be directed towards the merits of any specific proceeding. The Commission disagreed and concluded that Schelle's memorandum constituted a prohibited *ex parte* communication in a restricted proceeding because it (a) presented "sufficient facts to permit identification of the proceedings" and (b) was "directed to the merits or outcome" of the proceedings. Carpenter 3 FCC Rcd at 6142.

CCPR's *ex parte* contacts with the Chairman's staff and the Commissioners' staffs and then its Petition clearly identified the specific proceeding where it wanted the Commission to implement an auction (i.e., Ceiba, PR). CCPR's Petition and the content of its *ex parte* contacts as memorialized in its untimely filings with the

Commission³ were clearly "directed to the merits" of the Ceiba proceeding.

The Commission recognized in Carpenter that the ultimate issue in situations involving competing applicants is which applicant should ultimately receive the authorization. Any communications related to the question of who should receive the authorization is "directed to the merits of the proceeding." Id. In explaining why Schelle's memorandum was directed to the merits of the subject proceedings, the Commission stated

Under Schelle's settlement proposals, pending applications in these restricted proceedings would have to be amended to reflect Schelle's newly-acquired minority interest. The Commission would also have to be notified that the dismissal of pending pleadings and applications related to a settlement agreement. The Commission's review of the amended application could involve a determination by the Commission of whether Schelle's participation as a minority owner is in the public interest, as well as a review of the settlement agreement to determine whether other public interest questions are raised. As mentioned above, it is unclear whether the settlement agreements will be unanimously supported by all relevant parties; some applicants might have reasons to oppose them.

(citations omitted.) Id. Under CCPR's auction proposal, pending applicants that wanted to participate in auctions would amend their applications and the amended applications would be passed upon by the Commission. The Commission would require notice of pending applicants that dismissed because they did not or could not participate in auctions. Further, CCPR's participation in the Ceiba auction would have to be reviewed to determine whether its participation would be in the public interest or raise other public interest concerns (e.g., whether the Commission should change its

³ See, letter from Sara F. Seidman to William F. Caton dated August 28, 1996 concerning meetings with legal advisors to Commissioners Quello and Chong and letter dated September 26, 1996, concerning CCPR's contacts with the Chairman's legal advisors.

long-standing policy of prohibiting IOA operators from seeking the initial permanent authorization in markets where they have IOA, and whether CCPR's failure to abide by the terms of its IOA by disrupting the permanent licensing process raises concerns about its basic qualifications to be a Commission licensee).

In its *ex parte* communications, CCPR sought nothing less than wholesale dismissal of all pending applicants in the Ceiba proceeding and establishment of a new filing window to allow CCPR to participate in an auction for the permanent Ceiba RSA authorization. If Schelle's memorandum, which dealt only with Schelle's participation as a "white knight" minority owner in a prevailing applicant, was deemed to be directed to the merits of a proceeding, then certainly CCPR's attempt to have all pending applicants dismissed so it can bid to become the initial permanent licensee in Ceiba is directed to the merits of that proceeding.

The Commission has the power to waive its *ex parte* rules where, as with RSAOG's filings, the written submissions do not seek to adversely affect the protected applications that are being addressed. However, it could never be rational to allow *ex parte* filings seeking dismissal of protected applications.

All cellular applicants and licensees have been on notice of Carpenter since its publication in the FCC Record eight years ago. CCPR was reminded of Carpenter in various initial Comments (including those of RSAOG), but CCPR continues to file pleadings advocating dismissal of the pending RSA applicants in Ceiba without serving such pleadings on affected parties or requesting waiver of the service requirement. Although CCPR had the opportunity to attempt to distinguish Carpenter in its Reply Comments, CCPR

elected not to do so. Obviously, CCPR was unable to distinguish Carpenter.

The *ex parte* rules help ensure that the due process rights of all parties before the Commission are preserved. Commission consideration of the Reply Comments filed by CCPR is a violation of the constitutional due process rights of the applicants. For these reasons, the Reply Comments of CCPR should be stricken from the record.

Respectfully submitted,

RSA OPERATORS GROUP

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December 23, 1996

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CERTIFICATE OF SERVICE

I, Melissa L. Clement, a secretary at the law firm of Brown Nietert & Kaufman, Chartered, do hereby certify that I caused a copy of the foregoing "**Motion to Strike Reply Comments of Cellular Communications of Puerto Rico, Inc.**" to be sent via first class U.S. mail, postage prepaid or hand delivered, this 23rd day of December, 1996 to each of the following:

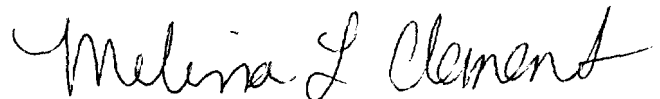
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